

# **EDMONDS CITY COUNCIL APPROVED MINUTES**

## **June 4, 2012**

The Edmonds City Council meeting was called to order at 6:00 p.m. by Mayor Pro Tem Peterson in the Council Chambers, 250 5<sup>th</sup> Avenue North, Edmonds. The meeting was opened with the flag salute.

### **ELECTED OFFICIALS PRESENT**

Strom Peterson, Mayor Pro Tem  
Frank Yamamoto, Councilmember  
Joan Bloom, Councilmember  
Michael Plunkett, Councilmember  
Adrienne Fraley-Monillas, Councilmember  
Diane Buckshnis, Councilmember

### **ELECTED OFFICIALS PRESENT**

Dave Earling, Mayor  
Lora Petso, Councilmember

### **STAFF PRESENT**

Phil Williams, Public Works Director  
Shawn Hunstock, Finance Director  
Rob English, City Engineer  
Jerry Shuster, Stormwater Eng. Program Mgr.  
Jeanie McConnell, Engineering Program Mgr.  
Kernen Lien, Associate Planner  
Jeff Taraday, City Attorney  
Sandy Chase, City Clerk  
Jana Spellman, Senior Executive Council Asst.  
Jeannie Dines, Recorder

### **1. APPROVAL OF AGENDA**

**COUNCILMEMBER BUCKSHNIS MOVED, SECONDED BY COUNCILMEMBER YAMAMOTO, TO APPROVE THE AGENDA IN CONTENT AND ORDER. MOTION CARRIED UNANIMOUSLY.**

### **2. APPROVAL OF CONSENT AGENDA ITEMS**

**COUNCILMEMBER BUCKSHNIS MOVED, SECONDED BY COUNCILMEMBER FRALEY-MONILLAS, TO APPROVE THE CONSENT AGENDA. MOTION CARRIED UNANIMOUSLY.**  
**The agenda items approved are as follows:**

#### **A. ROLL CALL**

### **3. AUDIENCE COMMENTS**

Mayor Pro Tem Peterson cautioned the audience that comments should not relate to Agenda Item 5.

**Al Rutledge, Edmonds**, announced the car show at Top Foods on July 14 to benefit the Carol Rowe Memorial Food Bank. He reported younger people such as college students and young families are coming to the food bank. He also announced there will be a booth at this Saturday's Farmers Market for the Edmonds Log Cabin where people can make a donation to fund maintenance of the log cabin.

### **4. APPROVAL OF CITY COUNCIL MEETING MINUTES OF MAY 21, 2012.**

Councilmember Bloom explained she had emailed City Clerk Sandy Chase to request that question marks replace periods in several places in the verbatim transcript as she was asking questions about the critical area, not making statements.

At City Attorney Jeff Taraday's request, Ms. Chase identified the places in the verbatim transcript where question marks would replace periods:

- *Page 7: Councilmember Bloom: So wildlife preserves are not critical areas? That's what you're telling me?*
- *Page 7: Councilmember Bloom: So the Critical Areas Ordinance does not include wildlife preserves as critical areas?*
- *Page 8: Councilmember Bloom: So it's not a wildlife preserve?*

Councilmember Bloom referenced one additional sentence she had requested be changed to include a question mark:

- *Page 7: Councilmember Bloom: So wildlife preserves are not critical areas?*

**COUNCILMEMBER FRALEY-MONILLAS MOVED, SECONDED BY COUNCILMEMBER BUCKSHNIS, TO ACCEPT THE MAY 21, 2012 MINUTES WITH THE CHANGES STATED. MOTION CARRIED UNANIMOUSLY.**

5. **APPROVAL OF FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR THE CLOSED RECORD REVIEW HELD BY THE CITY COUNCIL ON MAY 15, 2012 AND MAY 21, 2012. PROJECT DESCRIPTION: THE APPLICANT HAS APPLIED FOR A 27-LOT PRELIMINARY PLAT AND PLANNED RESIDENTIAL DEVELOPMENT (PRD) AT 23700 104TH AVE. W., PARCEL NUMBER 27033600304800. APPLICANT: BURNSTEAD CONSTRUCTION COMPANY, FILE NO.: P-2007-17 AND PRD-2007-18 / APPEAL NOS.: APL20120001 - APL20120004. APPELLANTS: LORA PETSO AND COLIN SOUTHCOTE-WANT (APL20120001); IRA SHELTON AND KATHIE LEDGER (APL20120002); CLIFF SANDERLIN AND HEATHER MARKS (APL20120003); DARLENE MILLER, RICHARD MILLER, CONSTANTINOS TAGIOS, AND SOPHIA TAGIOS (APL20120004)**

Mayor Pro Tem Peterson asked whether any Councilmembers had any ex parte communications to disclose.

City Attorney Jeff Taraday explained a couple Councilmembers emailed him with questions about whether contact with a particular person was ex parte communication if the person was not a party of record. He recommended Councilmembers disclose contact with any person other than City staff and lawyers representing the Council, Carol Morris and himself. Any citizen who spoke with a Councilmember about this topic is making an ex parte communication regardless of whether they are a party of record or only an interested citizen. With that clarification in mind, he invited Councilmembers to make disclosures regarding ex parte communications.

Councilmember Fraley-Monillas asked whether that would include disclosure of the content of the conversation. Mr. Taraday answered if a Councilmember had a conversation with someone outside the record, the first step is to disclose the person the Councilmember spoke to, who, what, where, when, and then the substance of what that person said or what the Councilmember said to them. If it is the type of communication that warrants an opportunity for rebuttal, the applicant and/or appellant will need to be provided an opportunity for rebuttal. For example if a constituent lobbied a Councilmember to vote a certain way on the closed record review and is asserting a certain argument about one of the three remand items, the other side would need to be provided an opportunity to rebut the substance of that communication. A Councilmember may have had communication with someone that does not warrant rebuttal because it is not close to the substance of the matter. He suggested taking each disclosure on a case-by-case basis.

Councilmember Buckshnis disclosed on June 1, 2012 Ken Reidy sent all Councilmembers an email with Burnstead in the subject line. She deleted the email and sent Mr. Reidy an email asking that he not send her any communication regarding the topic. Mr. Reidy responded but she did not open the email. Councilmember Buckshnis read her response to Mr. Reidy's email:

*Mr. Reidy,*

*As I have asked you before, do not send me anything regarding this topic as you are also fueling Ms. Petso's request for emails to and from me regarding this topic. I have deleted your response.*

Councilmember Buckshnis explained as she disclosed previously, Ms. Petso has requested all her emails from September 2011 to date regarding this topic.

Mr. Taraday explained he was copied on the email that Councilmember Buckshnis referred to. It did have Burnstead in the subject line so he could understand Councilmember Buckshnis' decision not to read it. While Mr. Reidy was referencing certain aspects of the Burnstead Woodway Elementary Plat hearing as background, his point in the email was in reference to his own property and not necessarily taking a position with respect to the matter before the Council. He did not believe Mr. Reidy's email needed to be read into the record because it did not come close enough to taking a position on this issue.

Mayor Pro Tem Peterson asked Councilmember Buckshnis whether that contact would cloud her opinion. Councilmember Buckshnis answered no.

Councilmember Yamamoto stated he has had no ex parte communications.

Councilmember Bloom disclosed that she read Mr. Reidy's email; the subject was Burnstead's argument regarding encroachment issues, boundary line disputes. It was her impression that Mr. Reidy's email did not take a position for or against the Burnstead development. There were a couple other emails from Ken Reidy; she read them all but did not think any of them were taking a position for or against the Burnstead project.

Councilmember Bloom referred to her previous disclosure regarding a conversation she had with Roger Hertrich, explaining she had not disclosed the content of that conversation at that time and would like to do so now. She spoke with Mr. Hertrich on either Saturday or Sunday, May 26 or 27; Mr. Hertrich brought up the Burnstead property and she immediately said she could not talk to him about it. Mr. Hertrich asked that she just listen which she did. Mr. Hertrich said she appeared to be quite upset when she left Council Chambers after the May 21 meeting, that she asked very good questions and he thanked her for doing so. Mr. Hertrich told her the decision would be appealed and that a unanimous decision by Council would make the appeal more difficult. Mr. Hertrich told her to hang in there. She thanked him for his support and they then discussed an unrelated topic.

Mayor Pro Tem Peterson asked Councilmember Bloom whether that conversation would affect her judgment in this matter. Councilmember Bloom answered no.

Councilmember Plunkett disclosed he received two emails from Mr. Reidy. He did not read them and forwarded them to Mr. Taraday.

Mayor Pro Tem Peterson asked Councilmember Plunkett whether the emails would cloud his judgment. Councilmember Plunkett answered no.

Councilmember Fraley-Monillas disclosed she received the same emails from Mr. Reidy and did not open them because she received Councilmember Buckshnis' email first. She had conversations with citizens

regarding the decorum and behavior at the Council meeting but it did not directly relate to the Burnstead property.

Mayor Pro Tem Peterson asked Councilmember Fraley-Monillas whether any of those contacts would sway her judgment in any way. Councilmember Fraley-Monillas answered no.

Mayor Pro Tem Peterson disclosed at the end of the last Council meeting, Mr. Hertrich expressed his appreciation for the way he ran the meeting, without any direct discussion regarding the issue. He also had a similar, brief conversation with Mr. Hall and Mr. Witenberg in which they expressed their appreciation for how he ran the meeting and there was no discussion regarding the particulars of the matter. He did not believe those communications would cloud his judgment in any way.

Mr. Taraday explained of the disclosures that have been made, the only one that warrants a possible rebuttal opportunity is Councilmember Bloom's discussion with Mr. Hertrich which was arguably lobbying for a particular vote or position. He offered the applicant an opportunity to rebut the substance of that communication. **David Johnston, Livengood Fitzgerald and Alskog, representing Burnstead Construction**, responded the applicant did not feel the need to comment on it.

Mr. Taraday summarized all applicable disclosures have been made and the Council could move on to the substance of the Findings of Fact and Conclusions that were drafted by Attorney Carol Morris with revisions made by him. He recommended the Council also address the maintenance bond in its discussion tonight. He recalled there was discussion at the May 21 meeting regarding the applicant looking into that issue and that issue could be revisited when the Findings and Conclusions were returned to the Council.

Councilmember Bloom explained in a conversation she had with Mr. Taraday today, he clarified what appeared to be misinformation in the Findings of Fact and Conclusions. Councilmember Bloom referred to the following language on page 2 of the Findings:

*WHEREAS, Ms. Petso appealed the City Council's decision to the superior court, which reversed the City's approval of the MDNS, preliminary plat approval and PRD approval; and  
WHEREAS Burnstead appealed the superior court decision to the Court of Appeals; and  
WHEREAS the Court of Appeals did not review the superior court decision and instead reviewed the decision of the City Hearing Examiner; and*

Councilmember Bloom referred to Item G on pages 9-10 of the Findings where Ms. Morris references the Hearing Examiner's decision and felt there was an inaccuracy in the Hearing Examiner's decision:

*G. SEPA: Appeals were filed based on the Hearing Examiner's decision, finding of fact 8:*

*There is nothing in the record to suggest that the City's civil and building permit 12 Edmonds Municipal Code section 20.07.005.H.9 review processes would not be able to fully mitigate all project specific impacts. There are no material adverse impacts discernible from the record. Additionally, the SEPA MDNS issued on April 19, 2007 appeals were denied. Subsequent decisions by the Superior and Appellate courts have upheld the SEPA decision.*

Councilmember Bloom asserted the language on pages 9-10, "Subsequent decisions by the Superior and Appellate courts have upheld the SEPA decision" was in direct contradiction to the statement in the WHEREAS clause, "Ms. Petso appealed the City Council's decision to the superior court, which reversed the City's approval of the MDNS, preliminary plat approval and PRD approval." She summarized the Hearing Examiner stated the superior court upheld the SEPA decision and Ms. Morris states in one of the WHEREAS clauses that the Superior Court reversed the City's approval of the MDNS preliminary plat and PRD approval.

Mr. Taraday explained the paragraph that follows the quotation from the Hearing Examiner's decision addresses this point. The superior court decision essentially does not matter because it was subsequently appealed to the court of appeals; anything that happened at the superior court level essentially got erased by the court of appeals decision. The court of appeals decision is the decision that matters for the purposes of Council review on remand. He agreed with the appellants to the extent that they are merely pointing out that is not a correct characterization of what happened at superior court; the court of appeals did not reverse the SEPA decision and essentially left it in place. What Ms. Morris drafted in the findings is: "The appellants challenge the Hearing Examiner's characterization of the Superior Court's decision as 'upholding the SEPA decision'." Ms. Morris is making note of the fact that the appellants are challenging the characterization; he agreed with their challenge of the characterization. The Findings go on to state, "However, the superior court decision is of no importance at this stage in the proceedings. The Court of Appeals did not find fault with the MDNS and specifically limited the remand to three issues."

Mr. Taraday explained language could be inserted if the City Council felt it was important to state that the Hearing Examiner's characterization of the superior court decision was in fact inaccurate. He did not feel that was necessary because the superior court decision has no legal effect whatsoever. Mr. Taraday summarized that he agreed the Hearing Examiner inappropriately characterized the superior court's decision as upholding the SEPA decision, but it does not matter.

**COUNCILMEMBER YAMAMOTO MOVED, SECONDED BY COUNCILMEMBER BUCKSHNIS, TO ADOPT RESOLUTION NO. 1278, A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF EDMONDS, WASHINGTON, RELATING TO LAND USE, ZONING AND SUBDIVISION, ADOPTING FINDINGS AND CONCLUSIONS TO AFFIRM THE DECISION OF THE EDMONDS HEARING EXAMINER TO CONDITIONALLY APPROVE THE WOODWAY ELEMENTARY PRELIMINARY PLAT AND PLANNED RESIDENTIAL DEVELOPMENT ON RE-HEARING, P-2007-17, PRD-2007-18, AND TO DENY THE APPEALS FILED BY RICHARD AND DARLENE MILLER, CONSTANTINOS AND SOPHIA TAGIOS, CLIFF SANDERLIN AND HEATHER MARKS, IRA SHELTON AND KATHIE LEDGER, LORA PETSO AND COLIN SOUTHCOTE-WANT.**

**COUNCILMEMBER BLOOM MOVED, SECONDED BY COUNCILMEMBER PLUNKETT, TO INSERT A SENTENCE ON PAGE 10 OF THE FINDINGS THAT THE HEARING EXAMINER MISSPOKE IN SAYING THAT SUBSEQUENT DECISIONS BY THE SUPERIOR AND APPELLATE COURTS HAVE UPHELD THE SEPA DECISION.**

Mr. Taraday suggested revising the second sentence of the first full paragraph on page 10 to read:

"While the City Council disagrees with the characterization of the superior court decision, it is of no importance at this stage in the proceedings."

Councilmember Bloom said she would prefer a stronger statement. Mr. Taraday responded that sentence captures the essence that the Hearing Examiner suggested that the superior court had upheld the SEPA decision and the amendment states the City Council disagrees with that characterization.

The maker of the motion, Councilmember Bloom and the second, Councilmember Plunkett, agreed to the sentence suggested by Mr. Taraday.

Councilmember Fraley-Monillas agreed with the wording Mr. Taraday suggested, finding it strong enough to indicate the Council's concern.

Councilmember Buckshnis asked why it was necessary to add the language if it has no relevance. Mr. Taraday agreed the Council did not need to revise the sentence; it was purely at the Council's discretion. Councilmember Buckshnis asked him to clarify the issue again. Mr. Taraday explained in her decision, the Hearing Examiner made this statement, "subsequent decisions by the superior and appellate courts

have upheld the SEPA decision.” That sentence is not entirely accurate because the superior court did not uphold the SEPA decision. While the version of the findings in the Council packet acknowledges the appellants’ point by stating “However, the superior court decision is of no importance at this stage in the proceedings.” If the Council wants to go a step further and essentially agree with the appellants’ point, it could add the language he suggested. He summarized legally there was no importance but by including this language the Council was disagreeing with the characterization of the superior court decision.

**AMENDMENT CARRIED UNANIMOUSLY.**

Mayor Pro Tem Peterson suggested the Council discuss the maintenance bond, referring to Item A in the Decision on page 20 of the Findings, “The City Council modifies Condition No. 8 of the Hearing Examiner’s Decisions to require that the Applicant post a five-year maintenance bond for the stormwater drainage system after final inspection and approval.” He recalled the Council asked for and received via staff a response from the bonding company that stated that modified condition would be difficult for the bonding company to abide by, that both State and City code require a two-year maintenance bond, and the bonding company was unwilling to commit to a five year maintenance bond.

**MAYOR PRO TEM PETERSON MOVED, SECONDED BY COUNCILMEMBER YAMAMOTO, TO STRIKE CONDITION A IN THE DECISION SECTION, REMOVING THE MODIFICATION OF CONDITION 8 AND RETURN TO A 2-YEAR MAINTENANCE BOND FOR THE STORMWATER DRAINAGE SYSTEM.**

Councilmember Plunkett asked if Paragraph A of the Decision was modified to state, “the City Council modifies Condition No. 8 of the Hearing Examiner’s decision to continue to encourage the applicant...” the fallback would be a 2-year maintenance bond. Mr. Taraday responded the City code would default to a 2-year maintenance bond; the City’s code is consistent with State law in that regard. He questioned the effectiveness of a condition that stated “encourage,” as it did not give administration any ability to enforce it. If there is a problem at the two-year inspection, even without the proposed language, the administration would still have the ability to do an inspection, require whatever necessary correction action be taken and not release the maintenance bond until corrective action has been taken. He did not recommend including language that encouraged the applicant to do something because he questioned whether it would be enforceable.

Councilmember Fraley-Monillas asked whether the Decision should include reference to a two-year maintenance bond if Paragraph A was deleted. Mr. Taraday responded the code requires a two-year maintenance bond regardless of whether there is a provision that specifically requires a two-year maintenance bond in the Decision. The Council could amend Paragraph A by replacing “five-year maintenance bond” with “two-year maintenance bond.”

Mayor Pro Tem Peterson proposed the following friendly amendment:

**TO RETAIN CONDITION A AND AMEND IT TO READ, THE CITY COUNCIL MODIFIES CONDITION NO. 8 OF THE HEARING EXAMINER’S DECISION TO REQUIRE THAT THE APPLICANT POST A TWO-YEAR MAINTENANCE BOND FOR THE STORMWATER DRAINAGE SYSTEM AFTER FINAL INSPECTION AND APPROVAL.**

Councilmember Buckshnis asked whether the Council could require it be returned to the Council in two years in light of Councilmember Petso’s indication that staff is run by the Mayor. Mr. Taraday responded amending Condition A as proposed would take away the administration’s ability to do anything less than a two-year maintenance bond.

**AMENDMENT CARRIED (5-1) COUNCILMEMBER BLOOM VOTING NO.**

Councilmember Bloom read a statement regarding her vote:

*I regret that I upset some participants in this process, but I do not apologize for it. My goal was to do my part in making sure that this development would not cause future environmental problems—namely flooding. My concern is that flooding could be a problem—especially with changing weather patterns—not only for the development’s home buyers and the surrounding property owners, but for the City. Secondarily, my concern is that the open-space requirements were not met.*

*Regarding my concerns about crediting a portion of a wild life preserve on the Burnstead property towards open space, the Edmonds Community Development Code related to Critical Areas (ECDC 23.40.320) under B. Critical areas regulated by this title, include: “5. Fish and Wildlife Habitat Conservation Areas.” So it appears we are allowing a portion of a critical area to be used as open space. Open space is defined in the PRD code as “usable space perpetually owned and maintained by the development.”*

*My concerns about the infiltration rate is increased by a passage in the Storm Water code (18.30.060) under Standards for storm water quality control: “Control by limiting peak water run off from the site due to high ground water tables in large portions of the city...(Meadowdale is referenced) there are few sites where infiltration should be considered.”*

*Also, the Storm Water Code 18.30.010 definitions of “Impervious surface” include far more than the “structures” which were used to calculate the amount of impervious surface allowed per lot in the Burnstead proposed development.*

*Both of these references are in the Burnstead materials presented to the Council and on the City’s website under the attachment linking to ECDC 18.30 Storm Water Management, record page 508-519.*

*The chief frustration for me is that—because of the legalities of an appeal—we were allowed to discuss only a few potential problems. Without access to a Back to the Future Delorean, our hands were tied.*

*I pushed as hard as I did, partly to make sure that nothing more could be done by the City, but also to learn what could be done differently in the future to avoid these concerns. If we learn from this process, it will have been worth it.*

*In sum, I believe that, given the confines of the appeal process, Council did all it could; but I’m not convinced that the project, as presently proposed, is in the best interest of Edmonds. Therefore, I will be voting no.*

Mr. Taraday recommended the Council fill in the blank space in Condition B. He suggested the language either be added to one of the existing conditions or be included in a new Condition 9.

**COUNCILMEMBER BUCKSHNIS MOVED, SECONDED BY MAYOR PRO TEM PETERSON, TO REVISE CONDITION B OF THE DECISION TO ADD THE LANGUAGE AS CONDITION 9 OF THE HEARING EXAMINER’S DECISION. MOTION CARRIED UNANIMOUSLY.**

**MAIN MOTION AS AMENDED CARRIED (5-1), COUNCILMEMBER BLOOM VOTING NO.**

## **6. COUNCIL COMMENTS**

Councilmember Buckshnis thanked the volunteers who assisted at the Waterfront Rotary Festival this weekend. She also thanked those who attended the festival, noting it was well attended despite the rain.

Councilmember Fraley-Monillas commented this has been a very difficult process. The Council was restricted to follow three areas of law. The Council did their homework and did their job. She found it heartbreaking to watch citizens and the Council torn apart by this issue. It has been challenging to maintain professionalism and not talk to citizens while they lobby in both directions behind the Council’s backs. She hoped everyone could move forward together rather than divided.

With regard to his upcoming retirement from the Council, Councilmember Plunkett thanked the people of Edmonds for their notes, emails, letters and comments as well as the comments from Councilmembers.

Mayor Pro Tem Peterson thanked Councilmember Plunkett for his service to the community. He recognized Councilmember Plunkett's experience and leadership in this issue and many others. He wished Councilmember Plunkett all the best.

**7. ADJOURN**

With no further business, the Council meeting was adjourned at 6:55 p.m.